# 82-1535

No._____

In the

**SUPREME COURT OF THE UNITED STATES**

October 1982 Term

**LEE LEONARD GARLING**
Petitioner

vs

**SECRETARY OF DEPARTMENT OF HEALTH AND HUMAN SERVICES**
Respondent

On Writ of Certiorari
to the
United States Court of Appeals
for the
District of Columbia Circuit

## PETITION FOR WRIT OF CERTIORARI

(together with **APPENDIX**)

LEE LEONARD GARLING
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No._____

SUPREME COURT OF THE UNITED STATES

October 1982 Term

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(The **APPENDIX** follows Petition's page 10)

The **QUESTION PRESENTED** is

Whether publication by the Social Security Administration of intimate medical details that it received from Veterans Administration for the sole purpose of determining whether Petitioner was eligible under the Social Security Act to receive disability insurance benefits should be condoned when

(1) the SSA published said details after finding Petitioner was disabled, that he had been eligible under the Act to receive such benefits ever since 1964, and no unresolved issue respecting disability was pending in the SSA when it published the confidential VA records of his disability,

(2) the publication was in studied disregard of Petitioner's plea for privacy,

(3) the SSA offered no justification for disregarding its own regulation and three cited statutes all of which require such medical data to be kept confidential, and

(4) when the only permissible inference to be drawn from the holding below is that United States courts will not enforce the protection promised statute?

**The Opinions below** by SSA, District Court, and the Court of Appeals for the District of Columbia Circuit appear in the Appendix and the Court of Appeals' opinion will not appear in official or unofficial reports.

**Jurisdiction of this Court** is conferred by 28 US Code §2101(c) because this Petition is filed within 90 days of the Court of Appeals' JUDGMENT filed 22 December 1982.

**Statutes Involved** (texts in Appendix):

5 US Code §552, Freedom of Information.

5 US Code §552a, Privacy Act of 1974.

38 US Code §3301, Veterans Benefits.

**Statement of the Case**: Petitioner applied to SSA for disability insurance benefits.

In March 1979 the SSA found Petitioner was disabled, covered by disability insurance, and that he had been eligible for such benefits under the Social Security Act since 1964. That finding became final, is still unchallenged, and forthwith removed all medical and disability issues from the SSA proceedings. Thus, the only issue remaining in the SSA proceeding after the

disability/eligibiity March 1979 finding was to determine the date as from which payments to Petitioner should commence.

In June 1980 the SSA denied the main part of Petitioner's payments-claim by disregarding an application it admitted having received and which, in fact and in law, established the date of his claim.

Although the only issue with which the June 1980 decision was legitimately concerned was determining the date as from which payments to Petitioner should begin, the Administrative Law Judge nevertheless included publication of eight pages of clinical details concerning Petitioner's disability going as far back as 1944.

The details published by SSA were from confidential VA files which had been disclosed to SSA only to allow it to decide whether Petitioner was eligible under the Act to receive disability insurance payments. The authorizaton required by 38 US Code §3301 for VA to disclose such data was given by Petitioner, but the requirement in that same statute that 5 US Code §552a must govern all disclosure of such data was disregarded by SSA.

In good time Petitioner asked the District Court in Washington, D.C. to review the SSA's various errors including its violation of the right to privacy promised him by the cited statutes.

The District Court denied relief and with respect to the **"Question Presented"** here it held that because Petitioner had

> "authorized in writing the Veterans Administration to release 'whatever medical information is necessary to adjudicate my social security claim'"

he could not object to later publication because, said the Court, the SSA was not required to keep medical data it received from the VA confidential. The Court went on to say that Petitioner's privacy did not seem to have been "abused."

As noted above, the Court purported to quote the language used by Petitioner in authorizing the VA to disclose medical data to SSA, but the Court omitted the limiting word "disability" from the text it purported to quote. Thus, instead of having said what the Court quotes him as writing to the VA, the undisputed record before that Court showed that Petitioner twice restricted the disclosure authoriza-

tion by the limiting word "disability" and in both instances the limitation was written in capital letters as follows:

> "I hereby request and authorize the Veterans Administration to release the following information [to SSA] . . . WHATEVER MEDICAL INFORMATION IS NECESSARY TO ADJUDICATE MY SOCIAL SECURITY DISABILITY CLAIM" (emphasis added here).

In good time Petitioner asked the Court of Appeals below to reverse. That Court allowed the Government to file its answering brief out of time. In that brief the Government recited a four word diagnostic summary of Petitioner's disability and Petitioner promptly filed a Motion asking the Court to require the Government to strike the offensive four words from its brief as violative of his rights that were sub judice in the appeal (Appendix Item #7). The Government offered no justification for its publication of that confidential medical data and the Court of Appeals granted the motion to strike (Appendix Item #6).

Petitioner informed the Court of Appeals that he would be unable to present oral

argument and the Court sua sponte ordered resolution of the appeal without oral argument. The Court of Appeals affirmed the decision of the District Court.

**The Jurisdiction of the Courts below** was invoked under 38 US Code §405(g).

**Argument**: In FCC v SCHREIBER, 381 US 167 (1965) this Court took pains to explain that courts do not have inherent power to settle disputes as to disclosure of private information when Congress has vested control elsewhere as to how and by whom disclosures may be allowed.

The District Court below, acting contrary to SCHREIBER, condoned the publication of medical details concerning Petitioner on the ground that the SSA did "not seem to have abused the [Petitioner's] right to privacy" in publishing several pages of clinical details concerning his disability as far back as 1944. But, the Privacy Act which governs here, gives no court the power to condone publication on such subjective grounds. Further, none of the three statutes here involved can be read as allowing publication of confidential medical data by governmental agency. When

¶(a)(2)(A) of 5 US Code §552 is read with ¶(b)(3) thereof, it is evident that it forbids any agency, to which it applies, from publishing medical details received from the VA <u>because</u> 38 US Code §3301 makes/keeps those records confidential.

Congress was not so concerned to prevent publication of medical data which is merely private as distinguised from data which by statute (such as 38 US Code §3301) is declared to be confidential. Thus, ¶(b)(6) of 5 US Code §552 (b)(6) gives the courts authority to decide whether publication of private medical data which is not specially protected against publication by statute is, in a particular case, an "unwarranted invasion" of privacy. If that were the test applicable here -- and it is not -- the SSA's publication would have to be held unlawful, for surely it cannot seriously be contended that there was warrant for publication of a clinical report dated in 1944 in the discussion of a claim that asserted no rights prior to mid-1964 and which, in fact, had abandoned <u>that</u> date and relied on a much later dated application which SSA admitted receiving but chose to ignore.

5 US Code 552a forbids disclosure of any personal medical data even to agency personnel for use within the agency unless such disclosure is for an internal "routine use" [¶(b)(3)], or unless the disclosure is made to agency personnel "who have a need for the record in the performance of their duties" [¶(b)(1)].

The receipt of confidential data imparts no right to make a further disclosure; certainly it grants no right to publish.

Disclosure of confidential medical data to agency personnel to allow them to discharge their agency duties implies no authorization to publish, and nothing in §552a authorizes any agency to publish anyone's medical details at any time.

38 US Code §3301(g) provides that any disclosure of medical information from its files conerning a veteran -- and Petitioner is an honorably discharged veteran whose total/permanent disability is service connected -- must be in accordance with the provisions of the Privacy Act even though the veteran has authorized the VA in writing to disclose his medical records to another agency.

In other words, disclosure by the VA of such records to another government agency can not of itself destroy the confidentiality of such medical records nor can it repeal 5 US Code 552 §(a)(2)(A) as conditioned by §(b)(3) thereof. And, after all why should any interdepartmental disclosure of data which is clearly of private, and not public, concern be viewed as a license for the receiving agency to publish?

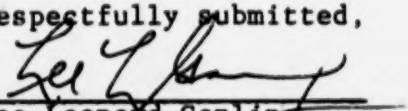
The assumption of the District Court that when Petitioner authorized the VA to disclose relevant medical data to the SSA he in effect executed a general release (ie. that he renounced his right to object to any later publication of such data) lacks justification of any kind. And this is so not only because the interdepartmental disclosure, which Petitioner asked the VA to make, was only to enable SSA to determine whether he was eligible under the Act to receive disability insurance benefits -- and certainly, disclosure of sensitive and confidential medical data for such a limited purpose to an agency which is itself charged by law to insure privacy for millions of medical reports

does not even begin to contemplate publication thereof -- but also it disregards the fact that when SSA received that data it was bound by all of the provisions of 5 US Code §552a to insure against unauthorized disclosure. Since details of Petitioner's disability were irrelevant to any issue before the ALJ (the only question being the effective date of Petitioner's application) it follows ineluctably that the publication here complained of was "unwarranted" and thus prohibited by ¶(b)(6) of 5 US Code 552.

Still further, because details relating to Petitioner's disability were not even relevant to the issue the ALJ had to decide, ¶(b)(3) of 5 US Code §552a prohibited the SSA from allowing him to even <u>see</u> that data.

Lastly, publication by SSA of medical details which 38 US Code §3301 insists must remain confidential was forbidden by ¶(b)(3) of 5 US Code §552.

Respectfully submitted,



Lee Leonard Garling,
**Petitioner** <u>pro se</u>

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# APPENDIX TO
# PETITION FOR WRIT OF CERTIORARI

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No._____

SUPREME COURT OF THE UNITED STATES
October 1982 Term

**APPENDIX TO PETITION FOR WRIT OF CERTIORARI**


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**STATUTES INVOLVED**


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**Item #1** **(FILED 22 December 1982)**

UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 82-1433

GARLING v SECRETARY of Department of Health and Human Services

[NOTE. The following notation appears on but is not a part of the JUDGMENT of 22nd December 1982; text at Appendix Item #5].

NOT TO BE PUBLISHED - SEE LOCAL RULE 8(f)

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**Item #2** **(filed 9th February 1982)**

UNITED STATES DISTRICT COURT
for the
DISTRICT OF COLUMBIA

Civil Action No. 81-1140

GARLING v SCHWEIKER, Secretary of H.E.W.

**ORDER** and **MEMORANDUM**

Upon consideration of plaintiff's motion for judgment on the pleadings, defendant's motion for judgment, the memorandum in support thereof and opposition thereto, and the entire record herein and for the reasons stated in the accompanying memorandum it is by the Court this 8th day of

February, 1982,

ORDERED that plaintiff's motion for judgment on the pleadings be, and hereby is, denied; and it is further

ORDERED that defendant's motion for judgment be, and hereby is, granted; and it is further

ORDERED that judgment be, and hereby is, entered for defendant and against plaintiff in this case.

s/Oliver Gash, Judge

**MEMORANDUM**

This case involves the Social Security Administration's denial of retroactive disability [insurance] benefits for the period August 1965 to April 1977 to the plaintiff, Lee Leonard Garling. * * *

* * *

The plaintiff next contends that the Administrative Law Judge's decision and the administrative record itself violates the law by making use of Veterans Administration records which, under 38 U.S.C. §3301, are confidential and may not be disclosed. This claim is without merit

since the plaintiff authorized in writing the Veterans Administration to release "whatever medical information is necessary to adjudicate my social security claim" . . . The SSA used the information for one purpose only - to adjudicate Mr. Garling's disability claim. Nothing in 38 U.S.C. §3301 or the cases interpreting it requires that, once information has been released at a claimant's request to another agency, the other agency must keep the information under seal and out of the public record. Mr. Garling's case made some discussion of his disability inevitable, and the SSA does not seem to have abused the plaintiff's right to privacy in this matter.

* * *

s/Oliver Gash, Judge

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**Item #3** **(dated 3rd March 1981)**

Social Security Administrtion
Washington, D.C. 20013

**ACTION OF APPEALS COUNCIL**
**ON REQUEST FOR REVIEW**

[Under date of 3rd March 1981 the SSA's Appeals Council wrote Petitioner refusing

to review the decision of Administrative Law Judge Robbins. The Appeals Council declined even to take notice of the **"Question Presented"** here]..

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**Item #4** **(dated 19th June 1981)**

**DECISION OF THE**
**SSA's OFFICE OF HEARINGS AND APPEALS**
Claim of Lee Leonard Garling
[Social Security # 188-07-6006]

This case is before the Administrative Law Judge on a request for hearing. * * * This decision is made on the basis of the documents contained in the claim file as indicated in the list of exhibits hereto attached.

The issue herein is whether payment of disability benefits which were awarded to the claimant beginning with May 1977, can start earlier than May 1977. * * *

* * *

. . . After certain medical records were received from the Veterans Administration the disability claim was allowed and the Administration established a date of onset of disability [and eligibility under the

Act to receive disability insurance benefits] as of June 30, 1964 . . ." *

* * *

s/ Horace H. Robbins
Administrative Law Judge

[The following is quoted from the index of exhibits attached to the ALJ's decision]:

| Exhibit No. | Designation [as to contents] | No of pages |
|---|---|---|
| | * * * | |
| 12 | Medical statement by George E. Price, M.D., dated 4-14-44 | 1 |
| 13 | VA Treatment and Progress Record for period 6-3-59 - 12-14-67 | 5 |
| 14 | Report of neuropsychiatric examination by A. Rodriguex, M.D., chief, NP Examination Service, VBO, Washington, D.C. 5-10-~~63~~ 68 | 2 |

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* NOTE: The ALJ's discussion of medical details (p. 108 of Joint Appendix in the Court below) is omitted since repetition here would further infringe Petitioner's rights. The ALJ attached **eight** pages of clinical reports as exhibits to his decision (listed on this page) in addition to discussing them in his text wherein he quoted one such report dated in 1944.

**Item #5** **(Filed, 22 December 1982)**

[NOTE: Here is the **JUDGMENT** which this Petition asks be reviewed and reversed]:

UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 82-1433

GARLING v Secretary of Department
of Health and Human Services

Before: Bork and Scalia, Circuit Judges
and Bazelon, Senior Circuit Judge

**J U D G M E N T**

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court on appeal is hereby affirmed, for the reasons set forth in the Memorandum Opinion of Senior District Judge Gash.

s/Per Curiam * * *

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**Item #6** **(Filed, 29th October 1982)**

UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

GARLING v SECRETARY of Department of Health and Human Services

O R D E R

On consideration of appellant's motion to strike offensive material needlessly/ improperly included in the answering brief filed on behalf of appellee, filed September 24, 1982, no response having been submitted thereto, it is
ORDERED by the Court that the aforesaid motion to strike is granted.

For The Court * * *

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**Item #7** **(Filed 24th September 1982)**

[NOTE:In part here pertinent, the **Motion to Strike**, which was granted by the above ORDER said this]:

1. Appellant, Lee Leonard Garling, asks this Court to order the Appellee to delete the four word medical diagnosis recited in the fifth sentence of the second paragraph of the "Counterstatement of the Case" in BRIEF FOR APPELLEE. * * *

2. The authority of this Court to grant the requested relief is inherent in all courts of record as is exampled by Rule 12(f), Federal Rules of Civil Procedure. The said Rule 12(f) is merely declaratory of the power of the courts to prevent the wrongful use of the judicial process by litigants who attempt to (or by negligence) publish unlawful matters in the guise of briefs or pleadings.

3. As grounds justifying the present request, Appellant relies on the following:

a. The public recitation in BRIEF FOR APPELLEE of the said diagnosis is utterly immaterial to anything contended for by the Appellee and it is irrelevant, as answer, to anything contended for by this Appellant; i.e., the instant disclosure cannot assist this Court in the resolution of any dispute before it. Further, the published information is highly offensive to this Appellant who considers that such publication holds him up to public ridicule and contempt.

b. The Judge in the District Court below found no occasion to recite the subject

diagnosis in his eleven page opinion, and the Appellee has not suggested that that omission was improper.

c. As Defendant in the court below, Secretary Schweiker did not publish the cited diagnosis and, quite obviously, he was not prejudiced in that court by reason of that restraint.

d. Upon learning of this improper publication, this Appellant wrote the Assistant United States Attorney in charge of the Appellee's case in this Court and asked that the offensive material be striken from the brief . . .

e. In view of [my] objection to the earlier disclosure by the SSA of this (and related) medical information -- objection to such disclosure constituting an important part of this litigation -- the SSA has long had full and actual notice of the fact that any disclosure of this confidential diagnostic information was particularly offensive [to me] who had authorized release . . . only for the use of professional personnel in the SSA for the purpose of determining

whether [my] disability qualified as such under SSA regulations. In the light of that notice and knowledge, and because the offensive disclosure did not serve any useful purpose, Appellant submits that the instant publication constitutes a misuse (if not an abuse) of the judicial process and should be striken from BRIEF FOR APPELLEE.

WHEREFORE, the premises considered . . .

s/Lee L Garling, Appellant pro se

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**STATUTES INVOLVED**

**5 US Code §552 Freedom of Information Act**

(a) Each agency shall make available to the public information as follows:

* * *

(2) * * *

(A) final opinions . . . made in the adjudication of cases;

* * *

* * *

(b) This section [i.e., including the foregoing (A)] does not apply to matters that are -

* * *

(3) specifically exempted from disclosure by statute;

* * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy

* * *

* * *.

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**5 US Code §552a, Privacy Act of 1974:**

(a) Definitions. For the purposes of this section -

* * *

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to

whom the record pertains, unless disclosure of the record would be -

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties,

* * *

(3) for a routine use as defined in subsection (a)(7) of this section and described in subsection (e)(4)(D) of this section;

* * *

* * *

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**38 US Code, Veterans Benefits**

**§3301.** Confidential nature of claims.

(a) All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Veteran's Administration . . . shall be confidential and privileged, and no disclosure thereof shall be made except as provided in this section.

(b) The Administrator shall make disclosure of such files, records and other papers and documents as described in sub-

section section (a) of this section as follows:

(1) To a claimant or duly authorized agent or representative of a claimant as to matters concerning the claimant alone when, in the judgment of the Administrator, such disclosure would not be injurious to the physical or mental health of the claimant . . .

* * *

* * *

(g) Any disclosure made pursuant to this section shall be made in accordance with the provisions of section 552a of title 5.